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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1684

THOMAS M. FAHEY, *Appellant,*

v.

CHARLES J. HYNES (Special Prosecutor), *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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June 4, 1979

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THOMAS M. FAHEY, *Appellant,*

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CRITICAL ADDITION TO THE STATEMENT OF THE CASE

Appellant was shocked and outraged when he discovered after receiving the appellee's motion to dismiss (on May 26, 1979) that the appellee had improperly obtained possession of the subpoenaed papers from the Onondaga County Court Clerk in order to manufacture what appellee considers is a "mootness" question.

The basic facts of the matter, together with a refutation of appellee's mootness argument are presented together under POINT IV of this document.

POINT I

REPLY TO THE RESPONSE OF APPELLEE TO THE FOURTH AMENDMENT QUESTION

In his jurisdictional statement (page 3), the appellant raised the following Fourth Amendment question:

> Fourth Amendment question:
>
> Does a State statute that authorizes warrantless seizures by the mere issuance of a non-judicial subpoena by any State agency authorized to issue subpoenas violate, on its face, the Fourth Amendment prohibitions against warrantless searches and seizures on the grounds that:
>
> (1) the statute does not require the State agency to obtain either a "search" warrant (for a criminal purpose) or an "inspection" warrant (for a civil purpose) upon the refusal of a subpoenaed party to permit a warrantless seizure of his property (including his books and papers), and
>
> (2) the statute does not in any way qualify as one of the "exceptions" to the prohibitions against warrantless seizures.

In his jurisdictional statement the appellant discussed in some detail the merits of the Barlow case, Marshall v. Barlow's Inc., 436 U.S. 307 (1978), as it applied to the challenged New York statute, and in this connection also pointed out (on page 20) that he believed the instant case represents the first case before this Court in which the New York State Court of Appeals has ruled on the applicability of the Barlow case to the statute being challenged by the appellant.

In his motion to dismiss, the appellee has totally avoided any discussion whatsoever on the merits of the applicability of the Barlow case (see page 9, POINT II).

Instead of responding to the Barlow challenge on the merits, the appellee has made, we submit, a fundamental error in law by seeking to rely on the totally inapplicable case of Moskowitz v. Hynes, ____U.S.____, 99 S.Ct. 302 (1978), (an appeal from the New York State Court of Appeals dismissed by this Court).

The appellee fails to point out that in the Moskowitz case the Barlow challenge was never presented to the New York Court of Appeals for the simple reason that the Barlow decision had not yet been handed down by this Court at the time the Moskowitz case was decided by the New York State Court of Appeals. Therefore, since the New York State Court of Appeals could not possibly have applied the Barlow case in its Moskowitz decision, the Moskowitz case has no bearing whatsoever on the Barlow challenge subsequently made by the appellant before the New York State Court of Appeals and before this Court.

We respectfully submit that the avoidance of the merits and the erroneous reliance on Moskowitz are fatal confessions of weakness, and very clearly warrant full briefing and argument before this Court (if not a reversal on the strength of the jurisdictional statement).

As the appellant has asserted in his jurisdictional statement, and now wishes to re-assert in the light of the appellee's response, if the Court opens this Fourth Amendment question to full briefing and oral argument, appellant fully expects to convince a unanimous Court that the challenged

statute is unconstitutional on the strength of the Barlow case alone, for the reasons summarized in the jurisdictional statement (on pages 16 and 17).

Appellant also wishes to call the attention of the Court to a highly significant misstatement by the appellee regarding the scope of the appellant's constitutional challenge that goes directly to the heart of the constitutional question.

In the very first sentence of appellee's POINT II (page 9), he creates the incorrect impression that the appellant is challenging two statutes, namely, Section 63(8) of the New York Executive Law and Section 2305(c) of the New York Civil Practice Law and Rules, when this is clearly not the case.

In the jurisdictional statement (page 5) appellant clearly indicated only one statute being challenged, which is the New York subpoena statute, namely, Section 2305(c) of the New York Civil Practice Law and Rules (CPLR 2305(c)), and identified that statute with the major heading:

"STATUTE CHALLENGED AS UNCONSTITUTIONAL"

Since CPLR 2305(c) is a subpoena statute that applies to all agencies of the State of New York, appellant also set forth the Executive Law Section 63(8) as a relevant statute to show how the particular State agency of the appellee (the State attorney-general) was empowered, to use the subpoena statute (and also to show that refusal to turn over supoenaed documents to the attorney-general was a crime (misdemeanor), which portion the appellee omitted from his excerpt of the statute). Appellant also identified the Executive Law excerpt (on page 6) with the major heading:

"RELEVANT COMPANION STATUTE"

Appellant is not challenging in any way the constitutionality of the Executive Law or any of the other State statutes that authorize all other State agencies to issue subpoenas under CPLR 2305(c).

Our focus is strictly on the subpoena statute, CPLR 2305(c). The basic constitutional objection here is that all agencies of the State of New York can now use CPLR 2305(c) to seize possession of documents with no limitation or qualification on the face of the statute regarding the seizure itself. The only limitations on the face of the statute concern conditions of possession after seizure (which the appellee admits in his discussion of the Fourteenth Amendment, page 10, lines 9 thru 15 of the motion to dismiss).

There are no limitations in the statute regarding "search" warrants or "inspection" warrants; there are no limitations here regarding seizure of only so-called "required records"; there are no limitations here regarding the "civil" or "criminal" purpose of the seizure; there are no limitations here regarding "special purpose" legislation for some particular or traditional public benefit. The statute has no substantive or procedural limitations of any kind on the seizure itself.

This statute, by giving every agency in the State of New York a "blank check" to seize documents, is a "seize first and answer questions later" type of command from the State legislature that has more far-reaching consequences, in appellant's opinion, than the consequences of the General Warrants and Writs of Assistance against which the Fourth Amendment was designed to protect us.

POINT II

REPLY TO THE RESPONSE OF APPELLEE TO THE FIFTH AMENDMENT QUESTION

In his jurisdictional statement (page 4) the appellant raised the following Fifth Amendment question:

Fifth Amendment question:

> The Fourth Amendment question aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the self-incrimination and due process protections of the Fifth Amendment on the grounds that the statute requires compulsive authentication and surrender of all subpoenaed documents and fails to provide a subpoenaed party who is an individual or a sole proprietor the opportunity to assert, if he wishes, under due process testimonial conditions, his Fifth Amendment privilege (regarding testimony, property, or books and records), and which compulsion is compounded by a companion statute that makes it a crime (misdemeanor) for a subpoenaed party to refuse to testify or to surrender possession of subpoenaed books and records.

The essence of the appelle's response to this question is stated at the end of his discussion of the Fifth Amendment challenge (page 11 of the motion to dismiss):

> "Therefore, under the "required records" doctrine which this Court recognized in Shapiro v. United States, 335 U.S. 1, 17-19 (1948), Fahey lacks a viable Fifth Amendment interest in the subpoenaed records."

We sharply disagree on the simple ground that the challenged New York statute bears absolutely no resemblance, in the "required records" sense, to the statute upheld in the Shapiro case, and therefore the Shapiro case does not support in any way the constitutionality of the challenged statute.

We submit instead that the Shapiro case fully supports the position of appellant. For the purpose of this appeal, appellant fully accepts the holding of the Shapiro case.

The statute involved in Shapiro was a statute designed for a limited legislative purpose, namely, price control. No one challenged the constitutionality of the legislative purpose of the Act (the Emergency Price Control Act).

The provisions for "required records" were included in this statute as a means of regulating and enforcing the limited legislative purpose of the price control statute.

The right to issue subpoenas to obtain the "required records" needed to enforce the statute was given to the single agency created to enforce the statute (the OPA: Office of Price Administration).

Thus, in the Shapiro case the Congress legislated "required records" to enforce a particular statute with a limited legislative purpose, and specifically empowered a single Agency to issue subpoenas to obtain the "required records".

Congress would never dare, appellant submits, to pass a "General Document Seizure" statute which made no distinctions between "required records" and other records, and no distinction

between records that belonged to individuals or corporations, but merely authorized all the agencies of the Federal government to take possession of (seize) any documents they chose to list on any non-judicial subpoena they issued to any party they decided to serve with the subpoena.

That such a statute would clearly violate the Fifth Amendment, both with respect to compulsory self-incrimination and with respect to due process is self-evident.

And yet, this is exactly what the New York State legislature has done in passing CPLR 2305(c).

The statute gives all the agencies of the State a "general warrant" to seize any documents they chose to list on a non-judicial subpoena and to seize the listed documents from the party they serve. The statute contains no provisions regarding "required records" or other types of records; no provisions regarding documents owned by individuals vs. those owned by corporations; and no provision restricting the use of the "seizure" subpoena to a limited legislative purpose as in the Shapiro case.

It is really an outrageous statute, which should be struck down on Fifth Amendment grounds alone.

In the instant case, because of a lack of due process provisions in the statute, the appellant had no opportunity to ever assert under testimonial conditions (if he wished to do so) his Fifth Amendment privilege.

The record of the Special Term proceedings will show that the Court not only denied appellant's request for an evidentiary hearing, but also denied

a request to file a reply to an answer served by the appellee on the very morning of the hearing.

This statute does not even contain the semblance of an opportunity to assert any Fifth Amendment protection.

Without a normal exchange of papers between the parties, and without an evidentiary hearing, there is also no opportunity to make a record hearing on Fifth Amendment matters, which would include such significant matters as determining what is a "required record" (appellee's answer at Special Term contained no allegation of obtaining any "required records"), proving allegations of harassment made by the appellant, and refuting allegations made in appellee's answer, to which appellant was not even permitted to reply.

> ———In this connection it should be noted that in the instant case, because of the absence of an evidentiary hearing, there has been no judicial finding in the record that any of the subpoenaed documents are so-called "required records".

Although the points discussed in the preceding paragraph are basically Fourth Amendment matters they have been mentioned here because the challenged statute is so devoid of Fourth Amendment requirements that the absence of those requirements maximizes the absence of Fifth Amendment protections.

POINT III

REPLY TO THE RESPONSE OF APPELLEE TO THE FOURTEENTH AMENDMENT QUESTION

In his jurisdictional statement (page 4) the appellant raised the following Fourteenth Amendment question:

Fourteenth Amendment question:

> The Fourth and Fifth Amendment questions aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the Fourteenth Amendment protection against the taking of property without due process, on the ground that the statute does not require the State, prior to the taking of property, to satisfy all the fundamentals of due process (notice, evidentiary hearing, and judicial sanction).

The essence of appellee's response to this question is that:

> (1) the subpoena itself satisfies the notice requirement of due process by informing the subpoenaed party when and where the seizure will take place, and
>
> (2) the subpoenaed party can obtain judicial participation after the seizure to affect the terms and conditions of the period of possession.

Appellant submits that these responses do not satisfy the due process requirements of the Fourteenth Amendment.

Appellant submits that "notice" means notice of a due process hearing, whether it is before a court or an administrative hearing conducted with all of the elements of an adverserial proceeding.

Appellant contends that an "evidentiary hearing" is an essential part of any proceeding involving the taking of property. This element is absent from this challenged statute.

Appellant contends that "judicial sanction" pertains to obtaining judicial approval for the taking of property before the property is actually taken, and not after it is taken.

Under the challenged statute a subpoena could require a subpoenaed party to turn over documents "on demand" or "immediately". In such a circumstance the subpoenaed party has the choice of:

> (1) refusing to turn over his documents, thereby violating one of the penalty provisions for not turning them over, or
>
> (2) turning the documents over, thereby losing his constitutional protections.

Appellant submits that this kind of choice hardly satisfies the due process requirements of the Fourteenth Amendment.

With respect to the instant case, the due process deficiencies have already been discussed with respect to the denial of a request for an evidentiary hearing and the denial of a request to file reply papers.

One highly significant additional point with respect to "notice" is submitted for the consideration of the Court.

If there had been a "notice" provision in the challenged statute, the appellee would never have been able to obtain an ex-parte Order from Special Term transferring custody of the subpoenaed documents from the Onondaga County Court Clerk to the appellee while the case was on appeal to this Court.

This incident, appellant submits, dramatically illustrates the absence of Fourteenth Amendment protections in the challenged statute.

POINT IV

RESPONSE TO THE MOOTNESS QUESTION RAISED BY THE APPELLEE

The appellee has improperly caused the transfer of the subpoenaed papers from the custody of the Onondaga County Court Clerk to himself.

Appellee improperly achieved this transfer while the case was on appeal to this Court by obtaining from a Special Term Justice an ex parte Order containing the erroneous statement that there was no appeal pending in this case and ordering the documents to be transferred to the appellee, which Order was filed with the Court Clerk on April 30, 1979.

The Order of the Special Term Judge is included herein at page A1 of the Appendix. The body of the Order contains no date, and also contains no identification of the Court from which it was issued.

Moreover, this action was taken by appellee in the face of a stay order issued by the Appellate Division (Fourth Department) of the Supreme Court of the State of New York on April 14, 1978, which stay is on file with the Onondaga County Clerk, and which stay has never been vacated.

It hardly needs saying that the appellee should not be allowed to profit from this wrong-doing.

The wrong-doing aside, the appellee has no basis for arguing mootness.

The possession of the documents by the appellee does not lessen the controversy, but rather intensifies it.

The only case cited by the appellee to support his position stands for a proposition that is exactly opposite to the position taken by appellee, namely, Defunis v. Odegaard, 416 U.S. 312 (1974).

Defunis stands for the proposition that a case is moot if the appellant has achieved his relief, or is about to achieve it, at the time the case is decided by the Supreme Court.

The only way appellant will achieve his relief in this case is to receive a favorable decision from this Court, which will result in the return of his subpoenaed documents.

Appellant respectfully submits that the wrongful transfer of the documents by the appellee does not provide any basis for mootness in this case.

Furthermore, the record at Special Term will show that the appellee has already indicated that he intends to examine the books of the nursing home not only for the years stated in the subpoena (1971 thru 1975) but also for subsequent years.

This means that the appellant can reasonably expect to be exposed to additional subpoenas for those subsequent years.

This fact which, we repeat, is in the record (Tr. 28) should, we submit, be dispositive of the mootness question that was caused by the appellee to deprive the appellant of his strong and valid constitutional claims before this Court.

Appellant respectfully observes that perhaps a strong fear of losing the case motivated appellee to such conduct.

In any event, appellee submits that this mootness "incident" points up very dramatically one of the due process weaknesses in the challenged statute which allowed this incident to occur because of the absence of any requirement of "notice" in the statute, which permitted the granting of the ex parte Order to transfer the documents.

This due process weakness, together with all the other constitutional deficiencies appellant has put forth to this Court warrant, we respectfully submit, a full briefing and oral argument in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Appellant

June 4, 1979

APPENDIX

ORDER OF JAMES P. O'DONNELL, J.S.C.
(undated) (filed April 30, 1979).

PRESENT:

HONORABLE JAMES P. O'DONNELL

In the Matter of the Application of

THOMAS M. FAHEY, d/b/a
Castle Rest Nursing Home,

Petitioner,

— against —

ORDER
Index No. 78-585

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor),

Respondent,

For an Order Pursuant to Articles 5, 23, and 78 of the Civil Practice Law and Rules.

UPON THE APPLICATION OF Paula M. Ryan, Esq., and upon all papers and proceedings had prior hereto,

IT APPEARING that the Order of this Court dated February 14, 1978, enforcing Respondent's executive subpoena duces tecum, has been affirmed at all appellate levels and no appeal or application for permission to appeal is currently pending in the instant matter; and it further appearing that the books and records subject to said subpoena duces tecum are in the custody of the Clerk of the County of Onondaga pursuant to the Order of the Honorable Hugh R. Jones dated February 22, 1978, and it further appearing that there are no remaining legal or equitable bars to the execution of this Court's order of February 14, 1978, it is

ORDER OF JAMES P. O'DONNELL, J.S.C.
(undated) (filed April 30, 1979).

ORDERED, that said Clerk prepare a written inventory of the materials deposited with him in the course of this litigation, including the contents of any boxes; said inventory is to be conducted in the presence of Respondent's representatives, and further

ORDERED, that the Clerk surrender custody of said materials to Respondent's representatives, with a copy of the written inventory, on or before May 7th, 1979.

Dated: Syracuse, New York

ENTER

s/ JAMES P. O'DONNELL
JAMES P. O'DONNELL
J.S.C.

APR 30 11 54 AM '79
ONON. CO. CLERKS OFFICE
s/ JAMES D. GORMAN
Clerk

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